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Supreme Court of the United States

OCTOBER TERM, 1961

No. 75

CARLIN CONSTANTINE VENUS, Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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MAY IT PLEASE THE COURT:

Petitioner will reply seriatim to the brief for the United States.

I.

At the bottom of page 7 and top of page 8 reference is made to the testimony of the clerk of the local board to the effect that no change of address card was received by the board, claimed by the petitioner to have been mailed in Los Angeles in February, 1955. The Court should bear in mind that the sole basis for this testimony was that the clerk,

who had absolutely no independent recollection of the matter, based her testimony solely upon the fact that when the file was examined prior to the first trial the card was not found in the file, and she testified that the card could have been misfiled in the office. [R. 86][1]

II.

Emphasis is placed upon the many different places where petitioner lived in Los Angeles after he returned from Modesto, California, and that he did not notify the board from February, 1955, until December, 1955, about these changes. See the brief of the United States at pages 8-9. This is immaterial because he had given his parents' address in San Diego.

III.

The Government, on page 14 of its brief, states that after June, 1954, petitioner began a new pattern "during the period in which he no longer hoped to be exempted." During this time petitioner was a pioneer full-time minister, as is shown in the record. [R. 104] Under the law at such time he was entitled to exemption, and it is contrary to the law for the Government to say that he "no longer hoped" to be exempted. (*Dickinson* v. *United States*, 346 U. S. 389 (1953)) As for what Venus hoped, there was no testimony about his hopes. The evidence is limited to his activity as a full-time minister. It is pure speculation for the Government to argue what petitioner's hopes were in the face of the record in this case. At that time his case was not being processed in the draft board but it was before the United States District Court at Los Angeles in a prosecution. Venus had good cause to believe that he would be exempted if reprocessed.—*Dickinson* v. *United States*, 346 U. S. 389 (1953).

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[1] Numbers appearing herein within brackets and preceded by "R." refer to pages of the printed record in this case.

IV.

At the bottom of page 15 it is argued by the Government that petitioner claims the right to file simultaneously various addresses with the board. This is not a true statement. In his letter of June 7, 1954, he merely mentioned two addresses, which is the same as was done in *Ward* v. *United States*, 344 U. S. 924 (1953). Rather than giving basis for impugning his motives in mailing the letter and claiming a scheme of failure to cooperate with the board this shows overzealousness on his part to comply with the law and be cooperative, as he usually had been, according to the testimony of the clerk. [R. 77]

V.

It is argued on page 16 of the Government's brief that the evidence refutes petitioner's contention that mail would have reached him through his parents' address in San Diego and that petitioner himself "recognized" that such address no longer sufficed. This statement is challenged as being absolutely incorrect. The letter of June 7, 1954, was sufficient to notify the board that he could be reached in care of his parents in San Diego.

VI.

The argument made at the bottom of page 16 attempts to generate a question of fact around the contents of the letter of June 7, 1954. The draft board file constituted documentary evidence. The letter of June 7, 1954, was a part of the document. The document cannot be impeached, as is attempted to be done by the Government. The letter as a part of the document constituted undisputed evidence. It is a mere question of law as to the construction of the document. It is not a question of fact.

VII.

The Government cites *Bartchy* v. *United States*, 319 U. S. 484 (1943); and *Ward* v. *United States*, 344 U. S. 924 (1953) (top of page 17), but fails to emphasize the important thing in those two cases. It is the viewpoint of the defendant that is crucial. See petitioner's main brief at pages 32-33.

VIII.

The argument of the Government at pages 20-22 is not contradicted. The act, however, is not one-sided. It was designed to protect the Government in time of peril and at the same time protect the rights of registrants. 50 U. S. C. App. § 451(c) (62 Stat. 604) says that there shall be a selection under the law "which is fair and just." This means that the rights of registrants under the law must be protected simultaneously with the execution of the process of selection. Registrants are not to be dealt with as though they were lawyers or registrants in administrative proceedings represented by counsel. (*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*, 220 F. 2d 792, 794 (7th Cir. 1955)) See also petitioner's main brief at pages 26-27.

IX.

The Government at the middle of page 23 of its brief quotes 32 C. F. R. § 1641.7(a), which provides that a registrant must give notice within ten days of any change in his "home address." Venus has always claimed San Diego as his home address. Modesto could not reasonably be considered as his home address. It would be unreasonable to argue that he considered the 1431 10th Street gymnasium in which he worked in Modesto as his home address. He merely had a place to sleep in the place where he worked. He resided in the gymnasium but his home address has always been San Diego. [R. 105] He never claimed Modesto as his home address. He merely gave his employer's address as his

temporary place of residence while working in Modesto. By no stretch of the imagination can this be considered to be his home address. The only time that he gave the board a notice of his *home* address was when he mailed the card from Los Angeles following the move made by his parents from one address to another address in San Diego. It was the San Diego address of the parents of Venus that was his home address and none other. He claimed the San Diego address as his home address in May, 1954, when he received the first notice to report for induction. He also claimed it when he was living at the many various addresses in Los Angeles doing "tree work" following his departure from Modesto in early February of 1955.

X.

The Government speaks of a "continuing obligation" on page 23 of its brief. There is no continuing duty involved in this case. The indictment was confined exclusively to the offense of failing to keep the local board informed and there was no allegation of continuing duty. Unless there was an allegation of a continuing duty it cannot be relied upon in cases of this sort.—*Graves* v. *United States*, 252 F. 2d 878 (9th Cir. 1958).

XI.

The Government in the same sentence on page 23 says that the regulations imposed a duty to keep the local board advised "at all times" where mail would reach him. It is submitted that "at all times" in this case the board was so advised that mail would reach Venus through his "home address" in San Diego, which satisfied the law fully.—See *Bartchy* v. *United States*, 319 U. S. 484 (1943); *Ward* v. *United States*, 344 U. S. 924 (1953).

XII.

In answer to the argument of the Government on page 23 of its brief about advising a location where mail would

reach the registrant, it should be remembered that the letter of June 7 gave two addresses: Modesto and San Diego. The testimony of the clerk was also that she knew that Venus could always be reached through the parents of Venus. [R. 68] The only reason the board did not attempt to reach him at his home address in San Diego was because the order was not returned from Modesto. [R. 69] While Venus was dealing with the United States Attorney, the United States Marshal and the Department of Justice under the first indictment he used his home address, that of his parents in San Diego. [R. 137-139]

XIII.

In the middle of page 24 it is stated that the issues in this case are primarily "factual matters within the province of the jury." This statement is true only insofar as the mailing of the card from Los Angeles to San Diego is concerned. It does not, however, apply to the construction and interpretation of the letter of June 7, 1954. This is a legal question that is exclusively for the court to determine and not for the jury.

XIV.

The Government at the bottom of page 25 states that there was a sudden reversal of scrupulous compliance after February 7, 1955, because Venus did not give any notice upon leaving Modesto. Emphasis seems to be placed upon the delay on the part of Venus in notifying the local board after leaving Modesto. The charge of the trial court was that a delay even until the 20th of February, 1955, in notifying the board was "not important." [R. 185] It was not the duty of petitioner to notify the local board when he left Modesto, but all that was required was to notify the board within a reasonable time after he arrived at his new address, according to the charge of the trial court, which would be anytime between February 8 and February 20.

[R. 185] Venus testified that he mailed the card from Los Angeles on February 19, 1955. [R. 106-110]

XV.

Emphasis is placed upon the testimony of the clerk that no card was received from petitioner in February, 1955, showing a change of address. (Government's brief, page 27) There is a frontal attack upon the testimony of the petitioner that he claimed to have mailed a card from Los Angeles in February, 1955, showing a change of address by reference to the testimony of the clerk that no card was received. The clerk did not testify categorically that "no postcard" was received in February of 1955. Her testimony was to the effect that the file was out of the office during that time [R. 81-83]; that there were between 13,000 and 14,000 files in the office [R. 85]; and that if the card were received it was possible that it could have been misfiled. [R. 86, 91] She never testified positively that no postcard was received. The effect of her testimony was only that she did not recall seeing a card in the file. [R. 86]

XVI.

The Government, at the bottom of page 27, makes reference to the search made by two clerks through 3,000 draft board files in an effort to locate the postcard. It is significant that this search was not made until more than five years after the postcard was mailed and only 3,000 of nearly 14,000 files were examined. [R. 90] This is a classic example of "too little too late." It is not sufficient to dispel the unequivocal testimony of the clerk that a mistake could have been made in filing the card. [R. 86]

XVII.

At the bottom of page 27 and top of page 28 the Government argues that the petitioner took no alternative action

to see to it that mail would reach him after he left Modesto. The testimony shows that the former employer of Venus would have forwarded mail to him at his home address in San Diego during February, 1955, and at any time up until April, 1955. [R. 131] It is submitted that the Government strains out the gnat and swallows the camel in an effort to make the Court believe that the petitioner gave Modesto as his home address.

XVIII.

On page 29 of the brief the Government says that the letter plainly reveals that Venus designated "Modesto as his principal and permanent address." This is unfair and an untrue interpretation of the letter in all the facts and circumstances and on the face of the letter itself. Venus was not a lawyer and he used the words "new address" in the June 7 letter purely in the sense that this would be the place where he would be physically present on and after June 7, 1954. The record clearly shows that the gymnasium in Modesto was not the home address of Venus. The place where he had to sleep in the gymnasium was not his home. It was merely a temporary abode in his employer's place of business and it is stretching reality too far to say that his cot in the gymnasium was equal to his home in San Diego. Surely petitioner did not intend, and the draft board did not believe, that this was the home address even though he mentioned the words "new address."

XIX.

In the middle of page 30 the Government asserts in effect that to sustain petitioner's position would be to allow registrants to simultaneously furnish various addresses and thereafter change addresses at will without notifying the board. This entire argument ignores the significance of the holding of this Court in *Bartchy* v. *United States*, 319 U. S.

484 (1943); and *Ward* v. *United States*, 344 U. S. 924 (1953). The petitioner did not simultaneously furnish "various addresses." He merely provided the board with his home address and the address of the place of his employment in Modesto where he would be working and sleeping. This certainly did not constitute a criminal scheme to evade the draft law, the position of the Government notwithstanding.

XX.

On the same page the Government suggests that a registrant can "complacently wait until the board had exhausted every possible source that might disclose his whereabouts." In this case there was no effort made to disclose the whereabouts of Venus as far as the board was concerned.

XXI.

In the same paragraph it is also said that to hold with petitioner would be to "place a premium on plain noncooperation," which is not the case here. Venus was ignorant of what was going on and was overly zealous in notifying the draft board by mail not only of his home address in San Diego but also of the address of his employer where he would be working and sleeping in another city.

XXII.

The Government, at page 31, says it has difficulty in understanding why the June 7 letter was sent at all if Venus intended to retain his parents' San Diego address as his mailing address. The regulations required him to give his home address. He did that by mailing to the board his San Diego address. This would have been sufficient. He was overzealous in wanting to be immediately informed by the board and so gave the address of the gymnasium where he was working in Modesto.

XXIII.

The Government makes a unique and extraordinary argument at pages 32-34. It is to the effect that since the jury found against the petitioner on the factual issue of whether he mailed the postcard from Los Angeles in February, 1955, such can be taken as further fact that the jury believed that he had criminal intent under all the circumstances not to keep the board informed of where mail would reach him in spite of the fact that he had on file the June 7 letter. Such type of piling inference upon inference in order to support a verdict of guilt is rejected by the law. It does not overcome the undisputed evidence, the letter of June 7.

XXIV.

The argument made by the Government regarding the instructions at pages 38-44 of the brief overlooks the real issue that the petitioner attempted to get before the jury but which was never allowed to go before it at the trial. The issue was that the jury should not confine its consideration alone to the failure of the clerk to find the card in the files of the local board or to a presumption that the draft board employees did their duty. There was the principal point that was relied upon by the Government in the trial of the case. It is the petitioner's contention that the jury should have been instructed that such facts alone are not sufficient in themselves to overcome the presumption of delivery of a regularly addressed and stamped postcard as in this case. The petitioner's theory of the case on this point was not properly and fully presented to the jury notwithstanding the instructions given by the court about the general presumptions of delivery.

CONCLUSION

Wherefore, for the reasons stated in petitioner's main brief and in this reply brief the judgment of the court below should be reversed and the cause remanded to the district court with instructions to sustain the motion for judgment of acquittal or in the alternative instruct that court to grant a new trial.

Respectfully submitted,

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November, 1961.